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OF THE
United States

October Term, 1928

No. 5[redacted] 12

Geo. B. Williams, William J. Finn, M. L. Myers, et al.,
Appellants,

vs.

Ray S. Riley, as State Controller of the State of California,
Appellee.

PETITION FOR REHEARING.
(Additional Citations)

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vs.
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Appellee.

PETITION FOR REHEARING.
(Additional Citations)

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

We desire to cite some additional decisions.

The *Frothingham* case was an attack on the Federal Maternity Act of Congress. This Honorable Court held

that the Act was not a judicial question, but was a political one, and that there was no precedent to guide it to its decision in that case.

We would like to call attention to a few cases in addition to those already cited in petition for rehearing.

Mr. Justice McReynolds in delivering the opinion said:

> "What constitutes a cause of action arising 'under' the laws of the United States has often been pointed out by this Court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law."
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> *First Nat. Bank of Canton v. Williams*, 252 U. S. 504, 64 L. Ed. 690.

Mr. Justice Sutherland who rendered the opinion of the Court said:

> "This appeal brings here for consideration a challenge to the constitutionality of an act of the Pennsylvania legislature approved May 13, 1927, P. A. Stat. Supp. 1928, Sec. 9377a-1, 9377a-2, a copy of which will be found in the margin." • • •
>
> "It further appears that the State Attorney General and the District Attorney of the proper county have threatened and intend to and will prosecute appellant for its violation of the act, the penalties for which are severe and cumulative. Suit was brought to enjoin these officers from putting into effect their threats, upon the ground that the act in question contravenes the due process and equal protection

clauses of the 14th Amendment. It is clear from the pleadings and the record, and it is conceded, that if the act be unconstitutional as claimed, appellant is entitled to the relief prayed. Terrace v. Thompson, 263 U. S. 197, 215, 68 L. ed. 255, 274, 44 Sup. Ct. Rep. 15; Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764."

Liggett Company v. Baldridge, 278 U. S. 105, 73 L. ed. 204.

This Honorable Court had before it two appeals in which the Statutory Court had enjoined the State officials from enforcing a statute fixing the price of gasoline.

This Honorable Court affirmed the lower Court and Mr. Justice Sutherland delivered the opinion and cited many decisions including the case of *Frost v. Railroad Commission*, 271 U. S. 583.

Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287.

In a late case in which Mr. Justice Sutherland delivered the opinion of the Court:

"This is an action brought by the commonwealth of Kentucky against plaintiffs in error to recover an amount levied under Sec. 1, chap. 120, Acts of 1924, which imposes a tax of 3 cents per gallon on all gasoline sold within the commonwealth at wholesale. The words 'sold * * * at wholesale', as used in the act, are defined to include 'any and all sales made for the purpose of resale or distribution or for use,' and also to include any person who shall purchase such gasoline without the state 'and sell or distribute or use the same within the state.' The tax was increased from 3 cents to 5 cents a gallon by

Sec. 1, Chap. 169, Acts of 1926; and part of the amount sued for was computed at the latter rate.

Plaintiffs in error are engaged in operating a ferryboat on the Ohio River between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that 75 per cent of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. The tax in question was computed and imposed upon the use of the gasoline thus consumed."

This Honorable Court reversed the judgment of the Court of Appeals of Kentucky, and held the gasoline law was unconstitutional.

Helson v. Kentucky, 279 U. S. 245, 73 L. ed. 683.

Mr. Justice Van Devanter in delivering the opinion said:

"These are suits, one by the commonwealth of Pennsylvania and the other by the State of Ohio to enjoin the State of West Virginia from enforcing an act passed by her legislature (Acts 1919, Chap. 71) which the complainants believe will largely curtail or cut off the supply of natural gas heretofore and now carried by pipe lines from West Virginia into their territory and there sold and used for fuel and lighting purposes. Although distinct, the suits are so much alike that they have been presented at the bar substantially as a single case. They will be dealt with accordingly in this opinion.

The West Virginia Act is set forth at length in the margin. The complainants challenge its validity on the ground that it directly interferes with interstate commerce and therefore contravenes the commerce clause of the Constitution of the United States."

Pennsylvania v. West Virginia, 268 U. S. 553, 67 L. ed. 1117.

The decree announced by Mr. Justice Van Devanter is as follows:

"These suits having been heretofore submitted on the pleadings and the evidence, and the court being now fully advised in the premises,

It is considered, ordered, and decreed as follows:

1. That an act passed by the Legislature of the defendant state February 10, 1919, which is set forth in the bills of complaint in these suits and known as Chapter 71 of the West Virginia Acts of 1919, is a void and inoperative enactment because it contravenes the limitations which the Constitution of the United States places upon the State action in respect of commerce among the several states;

2. That the defendant State and her several officers, agents and servants, are hereby severally enjoined from enforcing, or attempting to enforce the act;" (262 U. S. 623, 67 L. ed. 1143.)

Mr. Justice Brandeis in delivering the opinion said:

"Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

Buck v. Kuykendall, 276 U. S. 205, 69 L. ed. 623.

Mr. Justice Sutherland in delivering the opinion of the Court said:

> "We are of the opinion that the statute assailed contravenes the 14th Amendment and that the decree must be reversed."
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> *Tyson & Bro. v. Banton*, 273 U. S. 418, 71 L. ed. 718.

Mr. Justice Stone in delivering the opinion said:

> "Plaintiff in error, a national banking association doing business in Wisconsin, brought suit in the circuit court of Washington County, Wisconsin, to recover from the defendant in error, the City of Hartford, a tax assessed and paid for the year 1921 upon shares of stock in plaintiff bank, on the ground that the assessment and tax were prohibited by Sec. 5219 of the Revised Statutes of the United States (Act of June 3, 1864, Chap. 106, 13 Stat. at L. 99, 112; Act of February 10, 1868, Chap. 7, 15 Stat. at L. 34, Comp. Stat. Sec. 9784, 6 Fed. Stat. Anno. 2d ed. p. 796). The tax having been paid under protest, a suit for its recovery, raising the legality of the assessment, is permitted by local statutes. Wis. Stat. 1923, Sec. 7473.
>
> The Trial Court held the assessment illegal and gave judgment for the plaintiff. On appeal the Supreme Court of Wisconsin reversed the judgment with a direction to the Court below to enter judgment in favor of the defendant, dismissing the complaint. 187 Wis. 290, 203 N. W. 721. The case comes here on writ of error under Sec. 237 of the Judicial Code. Merchants National Bank v. Richmond, 256 U. S. 635, 637, 65 L. ed. 1135, 1137, 41 Sup. Ct. Rep. 619; First National Bank vs. Anderson, 269 U. S. 341, 346, 70 L. ed. 295, 302, 46 Sup. Ct. Rep. 135.

The contention here is that the State supreme court erred in holding that these tax statutes are not repugnant to Sec. 5219, Revised Statutes."

Again:

"Finally it is said that Sec. 5129 is directed to an unfriendly discrimination or hostile attitude on the part of a state and that here the Wisconsin legislation was not dictated by such considerations, since the challenged exemptions were merely incidental to the adoption of a state policy of substituting, so far as possible, an income for a personal property tax. But a consideration for the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden. The questions here considered arising from the application of an ad valorem tax are not affected by the amendment of Sec. 5219 by the Act of March 4, 1923, chap. 267, 42 Stat. at L. 1499, Comp. Stat. Sec. 9784, Fed. Stat. Anno. Supp. 1923, p. 84, which permits in lieu of the ad valorem tax on shares of national banks either a nondiscriminatory tax on the income of national banks or on the income derived from their shares. Judgment reversed."

First National Bank v. Hartford, ...U. S.....,
71 L. ed. 530.

We call attention of the Court to its decision in *Bekins Van Lines, Inc. v. Riley,* announced on November 25, 1929.

Mr. Justice McReynolds, in delivering the opinion, said:

"Appellants, as common carriers, are engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regu-

lar routes within California. The 1926 Amendment to the Constitution and the statutes of that State lay upon such carriers a tax of 5 per cent of their gross receipts in lieu of all other taxes, while other freight carriers, common and private, by motor vehicles, are subjected to different and, it is alleged, less burdensome taxation. Cal. Const. art. 13, Sec. 15; March 5, 1927, chap. 19, 1927 Cal. Stat.

By this proceeding instituted July 21st, 1928, appellants ask that the constitutional amendment and the statute which undertakes to lay such tax upon them be declared discriminatory and in conflict with Sec. 1 of the 14th Amendment; also that an injunction issue against the State Controller, forbidding him from attempting to enforce payment.

Upon motion without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.

The power of a state in respect of classification has often been declared by opinions here. We are unable to say that there was no unreasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed."

In the *Williams* case the appellants were not confined to Sec. 1 of the 14th Amendment, as they attacked the State law as also being contrary to the Constitution of the United States, the Federal Aid Legislation, and the Constitution of California.

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